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Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 272.

HAROLD HOBART, *Petitioner*,

v.

MICHAEL P. O'BRIEN, *Respondent*,

AND

HAROLD M. HOBART, *Petitioner*,

v.

JOHN G. DONOVAN ET AL., *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Table of Contents.

Preliminary statement 1

Argument 3

Question I. Derogatory comments by counsel for Mr. O'Brien at trial as tied in with derogatory comments in closing argument 3

Question II. Argument of counsel which was outside the scope of the evidence 6

Question III. Argument of counsel intended to incite the sympathies and prejudices of the jurors 8

Question IV. Verdict of jury having been contrary to the evidence and to the weight of the evidence adduced at trial 8

Conclusion 14

Table of Authorities Cited.

CASES.

Louisiana & Arkansas Railway Co. v. Johnson, 214 F. (2d) 290; cert. den. 348 U.S. 875 6

Stanczak v. Pennsylvania R.R. Co., 174 F. (2d) 43 ..... 6, 8

Thompson v. Bowles, 123 F. (2d) 487; cert. den. 315 U.S. 804 7

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Preliminary Statement.

This litigation arose out of a collision of a tank truck owned by respondent John G. Donovan, d/b/a The Utility Oil Company, and driven by his employee, respondent Michael P. O'Brien, and an automobile owned by Irma B. Hobart and driven by her husband, petitioner Harold M. Hobart, on Route 2 in Concord, Massachusetts, on June 21, 1952.

By a complaint filed June 26, 1952, respondent Michael P. O'Brien alleged that petitioner Harold M. Hobart negli-

gently drove a motor vehicle so that it collided with the motor vehicle being operated by Michael P. O'Brien. In a complaint filed May 8, 1953, petitioner Harold M. Hobart alleged that respondent John G. Donovan and his employee, respondent Michael P. O'Brien, negligently drove a motor vehicle on Route 2 in Concord, Massachusetts, against Harold M. Hobart, who was then driving on said highway. The two actions were consolidated for trial.

The record shows that in the early afternoon on June 21, 1952, Harold M. Hobart was travelling west on a section of Route 2 that comprised three lanes. As he approached the town line between Concord and Acton, approximately one quarter of a mile east of the scene of the accident, he observed indications of construction going on and found the northern lane obstructed by warning signs, dirt, materials and equipment. By reason of these obstructions he went into the middle lane. Travelling behind him some 50 feet was an automobile driven by Robert Whitney, a witness at the trial.

Michael P. O'Brien, driving a tank truck in the course of his duty as an employee of John G. Donovan, was travelling east in the southern lane of this highway. As Hobart and O'Brien approached and attempted to pass each other their vehicles collided. The truck and the automobile, as a result of this collision, ended up against a guard rail on the northern lane, Hobart's car facing south and the truck facing northeast.

Harold Hobart, in describing the accident, testified that he was travelling 25 to 30 miles per hour; that he at all times remained in the center lane and that, when the O'Brien truck was four or five car-lengths away, it left the southern lane and came into the center lane at an angle, and collided with his automobile. At one point in the trial Hobart said it was the truck's right bumper that hit his left front bumper. Later he changed this testimony, stat-

ing it was the left front side of the truck that collided with the left front side of his automobile.

The respondent Michael P. O'Brien testified that he was travelling approximately 25 miles an hour; that he was on the "right side" of the road and that the Hobart car came towards him, hitting the left front side of his truck. He further testified that the force of the collision pulled the wheel out of his hand and "swung the truck completely around," throwing him to the right side of the cab. On cross-examination he testified that the petitioner's car, at the time of the collision, was not in its right lane.

A witness, Whitney, who was travelling some distance behind Hobart, on direct examination stated that Hobart was driving in the center lane at the time of the collision and that the O'Brien truck, travelling with the two left wheels in the center lane, drove into the Hobart automobile. However, on cross-examination he stated that the Hobart automobile turned to the left immediately prior to the accident, and that the collision occurred as it was turning (Record, pp. 401, 402).

Argument.

QUESTION I. DEROGATORY COMMENTS BY COUNSEL FOR MR. O'BRIEN AT TRIAL AS TIED IN WITH DEROGATORY COMMENTS IN CLOSING ARGUMENT.

The petition (p. 3) complains that Mr. Prendergast made derogatory remarks concerning opposing counsel. It is a very easy thing to run through a 543-page transcript and pull from it individual remarks made by an attorney or a party, sew them together like a patchwork quilt, and make it appear that verbal arrows were being hurled constantly. This argument is grossly unfair.

The petitioner (p. 4) sets forth the following brief excerpts from the record:

> "Mr. Mahony: May I take a look at it?
>
> "Mr. Prendergast: Oh, sure (handing)—but you won't tell us the truth.
>
> "Mr. Mahony: Well, I do object to that.
>
> "The Court: All right counsel doesn't mean anything by that.
>
> "Mr. Prendergast: No, no, no."

The trial judge was in the best position to determine whether by-play of this sort would have any effect on the jury, and Mr. Mahony could not have worried about the matter much, because he never mentioned the remark again—never made a motion for mistrial, and was seemingly satisfied with Mr. Prendergast's admission that he was not serious in his statement.

At page 201 of the record, says the petitioner (p. 4), Mr. Prendergast made another derogatory remark to the effect that "You have to watch these fellows . . . They'll sneak in words you never were dreaming of."

The petitioner should have quoted the record a bit further on the same page where Mr. Mahony and Mr. Prendergast joked about Mr. Prendergast's workday beginning at four o'clock; then a true picture of the humorous spirit in which counsel were speaking would have been obtained.

Record (p. 201):

> "Mr. Prendergast: You have to watch these fellows, Mr. O'Brien. They'll sneak in words you never were dreaming of.
>
> "Q. How long would you stay?
>
> "A. Oh, 10 or 11 o'clock maybe later, until around 4.

"Mr. Mahony: Brother Prendergast says that would not be all day.

"Mr. Prendergast: Not to me.

"Mr. Mahony: Your day begins after four?"

At page 275 of the record we find that a question arose as to whose appearance had been filed in the case on behalf of the defendant when a certain deposition was taken. The names of other attorneys were mentioned. Finally Mr. Mahony said:

"I don't think Mr. Mahony's status is a fact, but I am in now."

Mr. Prendergast then joked:

"You are in, up to your neck."

What the petitioner does not state on page 4 of his petition is that the trial judge immediately said to the jury:

"You must disregard comments. They are made in the spirit of fun. We want to judge the case on the testimony."

In reference to the remark by the respondent's counsel in his argument that "; . . . I am sure if Mr. Mahony ever gets to the age Michael O'Brien is at and loses part of his lung, he will be the one big fellow to cry about it . . ."

This remark was retaliatory in character in that it was called for by the statements of Mr. Mahony in his argument to the jury belittling the damages which had been sustained by Mr. O'Brien in the accident.

The respondent submits that, if the petitioner made no complaint *in the course of the trial*, he should not be heard

to complain afterwards—just as in *Stanczak* v. *Pennsylvania R.R. Co.*, 174 F. (2d) 43 (7th Cir.), counsel for the appellant failed to object and "took a chance" on a reasonable verdict. At page 49 of 174 F. (2d) the Court of Appeals for the Seventh Circuit stated aptly:

> "..... The law is well established that a party cannot gamble with the possibility of a verdict and, thereafter, when the verdict proves unfavorable, raise a question he might have raised before verdict. Union Electric Light and Power Company vs. Snyder Estate Co., D. C., 15 F. Supp. 379."

See *Louisiana & Arkansas Railway Co.* v. *Johnson*, 214 F. (2d) 290 (5th Cir., 1954); cert. den. 348 U.S. 875 (1954).

QUESTION II. ARGUMENT OF COUNSEL WHICH WAS OUTSIDE THE SCOPE OF THE EVIDENCE.

There was no argument of counsel for O'Brien which was outside the scope of the evidence. Mr. Prendergast, in his argument to the jury, summed up the evidence of Mr. Robinson and others to the best of his ability. There was nothing said by Mr. Prendergast which was improper, and the argument in reference to Mr. Robinson was considered by the United States Court of Appeals in this case:

> Page 11, Opinion of the Court: "Another ground for Hobart's motion for a new trial in these cases was that the verdict was influenced by wholly improper argument of appellees' counsel. In pursuing this contention on appeal, Hobart largely points to statements made by O'Brien's counsel in his summation to the jury and in a few instances to statements by appel-

lees' counsel during the course of the trial. Without conceding that the remarks in question exceeded the bounds of propriety, we believe that Hobart cannot resort to them on appeal due to his failure to take timely objections to any of these statements at trial. See *Louisiana & Arkansas Ry. Co.* v. *Johnson*, 214 F.2d 290 (5 Cir. 1954), cert. denied 348 U.S. 875 (1954). In the absence of such objections the remarks of appellees' counsel are not available to him as grounds for reversal. Furthermore, it should be stated herein that during the trial the judge on his own initiative was quick to instruct the jury on occasion to disregard certain remarks of counsel for both sides."

Thompson v. *Bowles*, 123 F. (2d) 487 (8th Cir., 1941); cert. den. 315 U.S. 804.

At the conclusion of the charge the Court said (R. p. 538):

"Will counsel come up?"

"(Conference at the bench)

"The Court: Is there anything you want to say?

"Mr. Prendergast: No thank you, you did well.

"Mr. Buzzell (Associate counsel for Hobart) You did very well.

"The Court: I think I tried to be fair. Is that all right Mr. Mahony.

"Mr. Mahony: It is one of the best charges I heard you give."

"No objection was taken to any of the remarks complained of and we have no further occasion to consider such remarks. *Dowell, Inc.*, v. *Jowers* 5 Cir., 182 F. 2d 576 (579)."

The petitioner now contends that the argument by counsel for O'Brien tended to prejudice the jury against Hobart. This, it is submitted respectfully, is a pure afterthought on the part of the petitioner, an argument dreamed up after scanning the record when the trial had been completed and the verdict returned, and is entitled to no consideration.

In the whole record there is not *one* objection to the argument of counsel for Mr. O'Brien. Neither counsel for Hobart requested the Court to instruct the jury to disregard even one word uttered by counsel for O'Brien.

As in the *Stanczak* case, the respondent says that the trial Court was in a position to follow the arguments of counsel, observe the manner of counsel, and evaluate the effect upon the jury. His judgment that the arguments were not prejudicial and could not warrant a new trial should not be disturbed.

QUESTION III. ARGUMENT OF COUNSEL INTENDED TO INCITE THE SYMPATHIES AND PREJUDICES OF THE JURORS:

The respondent respectfully submits that this argument has been discussed heretofore under Question I and Question II.

QUESTION IV. VERDICT OF JURY HAVING BEEN CONTRARY TO THE EVIDENCE AND TO THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL:

The respondent respectfully submits that there is ample evidence of the petitioner Hobart's negligence.

The highway upon which this accident occurred, in June of 1952, consisted of three lanes, each approximately ten feet in width (R. p. 45). These lanes will be described hereinafter as the northerly, middle and southerly lanes.

Prior to the collision the vehicle driven by the plaintiff O'Brien had been operating in the southerly lane, travelling in an easterly direction. The vehicles driven by the defendant Hobart and the witness Whitney were headed west, and had been operated apparently in both the northerly and the middle lanes.

At about that point in the highway where the collision between the O'Brien and the Hobart vehicles occurred, the northerly lane was obstructed at certain points by mounds of earth (R. p. 2[illegible], Defendant Hobart, called by the plaintiff as witness in direct examination; p. 59, Plaintiff O'Brien).

Mr. O'Brien was driving behind a small delivery truck which had a box in the back of it. The box was bouncing about in the truck. Mr. O'Brien was driving at a rate of speed somewhere in the vicinity of twenty-five to thirty miles an hour, in a residential district, approaching the Acton-Concord line (R. p. 58). He saw the Hobart and Whitney vehicles some distance away, but noticed nothing unusual about their speed (R. p. 60). As he was driving along in the southerly lane he saw the Hobart car change its course, come to its left (R. p. 61), and the left front of the car came in contact with the left front wheel of the Utility Oil truck which Mr. O'Brien was driving (R. p. 61). The steering wheel of the truck was pulled from the plaintiff's hands, and the plaintiff was thrown down in the cab (R. p. 62).

First, with respect to the testimony of the plaintiff O'Brien, he stated that he was following the delivery truck with the box on the back of it, and suddenly the Hobart car came over to its left and struck O'Brien's truck on the rear of the left front wheel (R. p. 61). Mr. Mahony, cross-examining the plaintiff, tried his best to "shake" the plaintiff on his version of the accident. At page 86 of the record the following is found:

"X-Q. You have said, at one time, have you not, that the Hobart car was in its right lane, in the center lane, have you not? A. I said the right lane.

"X-Q. Was it in its right lane? A. Yes, that's right.

"X-Q. And that, at the time of the collision? A. *No, not at the time of the collision*." (Emphasis supplied.)

Contrary to the contention of the defendant, therefore, Mr. O'Brien certainly did state that the Hobart car abandoned the course it should have followed, and came across the road to strike his vehicle.

Mr. Mullaney, it is true, did not see the Hobart or Whitney cars prior to the moment of impact, but he stated that the truck swerved to the left after the impact, when the respondent landed partly on his lap.

An examination of the record of the testimony of Doctor Hobart reveals that he was thoroughly confused about the manner in which the accident happened. He was first called to testify by the plaintiff O'Brien and answered as follows:

"Q. What part of the truck did your car come in contact with? A. The truck's right bumper hit my right front bumper and wheel, my left front bumper and wheel.

"Q. The truck's what? A. The truck's right.

"Q. Right front bumper? A. That is right.

"Q. Hit what? A. Hit my left front bumper and wheel." (R. p. 273.)

Page 459 of the record contains the following questions by Mr. Daley and answers by the defendant Hobart:

"X-Q. Incidentally, Doctor, you have no confusion in your mind that the right hand side of your truck—your car—means the side opposite the driver? A. That's right.

"X-Q. And there is no confusion in your mind that the truck which you collided with was a truck in which the driver sat on his left side? A. That's right.

"X-Q. And that the right hand side of the truck with which you collided was the side opposite from the driver's seat? A. That's right."

Before the trial concluded, however, the defendant reversed himself completely, as the record shows at page 464:

"X-Q. Do you remember, Dr. Hobart, that when you were first brought to the witness stand you told this jury that the right-hand side of the truck—I'm emphasizing the right-hand side of the truck—collided with the left front of your vehicle? A. I did. I think I erred in that statement.

"X-Q. You know very well it wasn't the right-hand side of the truck that was in contact with you, don't you? A. No, it was the left-hand side of the truck."

The foregoing is typical of testimony by the defendant, who was of little if any assistance to the jury whatsoever.

Of one thing Doctor Hobart was positive. Once he moved into the middle lane on Route 2 he "made no shift to his left" to cause the contact with the truck. This assertion was sought to be buttressed by the defendant by calling to the stand a Mr. Whitney, who was operating the

vehicle behind the Hobart vehicle. In his brief the defendant claims that Whitney's testimony was in his favor. As a matter of fact, it was probably the testimony of Mr. Whitney, the ideally situated witness, which brought to the jury most effectively a vivid word picture that corroborated Michael O'Brien's contention that it was negligence on the part of Doctor Hobart that caused this tragic accident. The following portion of the record (pp. 401, 402) demonstrates beyond doubt that the impact occurred when the defendant Hobart turned his vehicle to the left:

"X-Q. Did you ever see the Hobart car turn to the left at any time from the time you first saw the truck, up until the accident happened? A. He might have turned away.

"X-Q. Not what he might have done, Mr. Whitney. The question is very simple, did you ever see the Hobart car turn to its left at any time between the time you first saw the truck and up until the accident happened? A. Slightly, maybe.

"Mr. Prendergast: I didn't ask you whether it was slight or not. May that go out, Your Honor?

"The Court: 'Slightly,' 'maybe,' yes, it may.

"X-Q. You have no interest in this case, have you? A. No, sir.

"X-Q. You are not prejudiced against the truck driver, are you? A. No, sir.

"X-Q. Let me ask you again, at any time from the time you first saw that truck up and until this accident happened, did you ever see Doctor Hobart's car turn to the left? A. Yes, sir.

"X-Q. And when he turned to the left, the accident happened, didn't it? A. As he was turning, sir.

"X-Q. As he was turning, the accident happened, didn't it? A. Yes, sir.

"X-Q. And you were within fifty feet of this accident when you saw that happening. That is so, isn't it? A. Yes, sir."

This was the testimony by Mr. Whitney which the defendant Hobart would have this Court believe was favorable to the defendant. On the contrary, it coincides exactly with Michael O'Brien's insistence that he was maintaining a straight course with his truck, approaching and passing these mounds of earth, when the defendant (who may have noticed the mound of earth when it was too late) swerved suddenly to his left, hit the rear of the left front wheel of the truck, caused the steering wheel to be wrenched from O'Brien's grasp, and forced the truck out of control.

The defendant in his petition (pp. 19 to 27, incl.) quotes testimony from the witnesses called by him at the trial in a vain effort to establish that the jury could have found that it was the vehicle driven by O'Brien which caused the collision. The short answer to this expansive quotation is that, assuming that the jury could have found in favor of the defendant, there was evidence upon which the jury could and did find in favor of the plaintiff O'Brien.

It was for the finders of fact, the members of the jury, to decide what testimony they would accept and what testimony they would reject. They accepted the version of the accident related by the plaintiff O'Brien.

The respondent submits respectfully that there was such evidence in the case, as the foregoing quotations from the record demonstrate amply. O'Brien "was where he was obliged to be and had a right to be." The jury must have found that Hobart was "where he had no right to be and no excuse for being." On this evidence the jury was warranted in finding Hobart negligent, and O'Brien free from contributory negligence.

Conclusion.

There were several other points argued by the petitioner (such as the Concord District Court record and testimony of John H. Robinson), but these points have been set forth and discussed so completely by the United States Court of Appeals in its decision (Petition for Writ of Certiorari, pp. 47-50) that the respondent feels such points do not warrant further consideration.

The decision of the Court below is correct. The petitioner has failed to present with accuracy, brevity and clearness any considerations warranting a further review. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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